No. 97-843

In the Supreme Court of the United States

OCTOBER TERM, 1998

AURELIA DAVIS, AS NEXT FRIEND OF LASHONDA D.,
PETITIONER,

v.

MONROE COUNTY BOARD OF EDUCATION, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* INDEPENDENT WOMEN'S FORUM IN SUPPORT OF THE RESPONDENTS

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BRIEF OF *AMICUS CURIAE* INDEPENDENT WOMEN'S FORUM IN SUPPORT OF THE RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

The Independent Women's Forum ("IWF") is a non-profit, non-partisan organization founded by women to foster public education and debate about legal, social, and economic policies affecting women and families. The IWF is committed to policies that promote individual responsibility, limited government, and economic opportunity.

SUMMARY OF THE ARGUMENT

Our nation's schools are today increasingly expected to address student conduct which, twenty years ago, would have been thought to be a matter of parental responsibility, including conduct which would simply have been unimaginable in a bygone era. Petitioner in this case carries that expectation to its illogical extreme, asserting that a school that does not respond effectively to an allegation of misconduct *by one of its students* has committed an intentional act of sex discrimination under Title IX of the Education Amendments of 1972, on the basis of which the school may face private lawsuits for monetary damages and the loss of all federal funding.

Neither the statutory framework of Title IX, nor this Court's precedents, support the view that a school district may be held liable under that statute for failing to respond to a complaint of student misconduct. Nevertheless, for the past few years, the Department of Education's Office For Civil Rights (the "OCR") has employed the specter of such liability as a tool to force schools to adopt inflexible and draconian

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[1] Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

policies that limit the discretion of teachers in dealing with student misconduct. The Petitioner now asks this Court to give force of law to the OCR's views on this issue and, thereby, to visit even more broadly and profoundly upon the nation's schools the deleterious effects which the OCR's position has already begun to have.

The IWF believes that the creation of a new private right of action under Title IX for student misconduct will not further the non-discrimination policies of the statute and, in fact, will frustrate the educational mission of our public schools. Such a cause of action would, in effect, transform Title IX into a Federal Student Civility Code, force schools to enact large and unnecessary bureaucracies, and lead schools to institute extreme and inflexible measures that will infringe the liberties of all students. Because imposing liability on schools for the misconduct of their students – whom public schools neither choose as attendees nor have free reign to exclude – will harm all students, this Court should not create such a cause of action out of whole cloth.

STATEMENT OF THE CASE

Amicus hereby adopts and incorporates by reference the Statement of the Case set forth in Respondent's brief.

ARGUMENT

I. NEITHER THE TEXT OF TITLE IX NOR THE IMPLEMENTING REGULATIONS CONTEMPLATE SCHOOL DISTRICT LIABILITY FOR STUDENTS BEHAVING BADLY.

Title IX of the Education Amendments of 1972 provides in pertinent part that:

> [n]o person . . .shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). Title IX was enacted to provide educational institutions and programs an incentive to end institutional sex discrimination and operates by conditioning an offer of federal funding on a promise by the recipient not to discriminate.[2] Gebser v. Lago Vista Sch. Dist., 118 S.Ct. 1989, 1997 (1998) (*citing* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 599 (1983) and Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

The language of Title IX provides no warning that a school district's federal funding might be contingent on its response to discrimination by non-agent, third-parties. Nor do the properly promulgated implementing regulations provide any basis for linking a grant of federal funding to a school district's response to misconduct by third-party students. To the contrary, the implementing regulations prohibit only *affirmative* actions by grant recipients. See 34 C.F.R. §106.31(b) (1997).[3] Indeed, the only mention of third-

[2] Because students are not direct recipients of the assistance to which Title IX refers, the actions of students cannot themselves constitute a violation of Title IX. See Rowinsky v. Bryan Ind. Sch. Dist., 80 F.3d 1006, 1012-13 (5th Cir.), cert. denied, 117 S.Ct. 165 (1996); cf. 34 C.F.R § 106.31(b) (prohibiting certain practices by grant recipients only).

[3] The regulations provide that:

> [A] recipient [school or other educational program] shall not, on the basis of sex:
>
> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> (2) Provide different aid, benefits, or services or provide [them] in a different manner;
>
> (3) Deny any person any such aid, benefit, or service;
>
> (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;. . .
>
> (6) Aid or perpetuate discrimination against any person by providing

parties is found in subsection (b)(6) of the regulations, which prohibits grant recipients from "[a]id[ing] or perpetuat[ing] discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees." This regulation, by its terms, prohibits schools from significantly assisting third-parties which discriminate in *providing services or benefits to students or employees,* such as bus companies, outside special education consultants or school insurers. Students are clearly *not* the type of third-parties referred to by subsection (b)(6), which, in essence, applies to co-venturers selected by schools to help fulfill their educational mission. The specificity of the prohibition set forth in subsection(b)(6) strongly suggests that any broader application to third-parties is beyond the scope of Title IX.[4] Thus, neither the text of the statute nor the implementing regulations support the position that school districts may be held liable for monetary damages or subject to government sanction because of its response (or lack thereof) to misconduct by its students. See generally Audra Pontes, *Peer Sexual Harassment: Has Title IX Gone Too Far?*, 47 EMORY L.J. 341 (Winter, 1998).

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significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R § 106.31(b) (1997).

[4] Nor do school districts that fail to deal effectively with complaints of student misconduct limit a student "in the enjoyment of any right, privilege, advantage, or opportunity." 34 C.F.R § 106.31(b)(7). The language of this subsection prohibits recipients from affirmatively acting to limit a student on the basis of sex; it cannot reasonably be read to include the actions of third-parties. See Rowinsky, 80 F.3d 1006, 1014 n.21.

II. CREATING A FEDERAL CAUSE OF ACTION FOR "PEER HARASSMENT" WILL NOT FURTHER THE PURPOSES OF TITLE IX AND WILL FRUSTRATE THE EDUCATIONAL MISSION OF OUR PUBLIC SCHOOLS.

A. There Is No Principled Basis To Elevate Sexual Misconduct By A Student Above Other Serious Student Misconduct.

No one disputes that our nation's schools must address serious student misconduct on a daily basis. The harassment of a student by his or her classmates – whether sexual or otherwise – is always deplorable. But, in asking this Court to create a federal cause of action for "peer sexual harassment", Petitioner implausibly elevates inappropriate sexual behavior above all other types of student misconduct. Clearly, a known gang member who is caught bringing a gun to school poses a far greater potential threat to his peers (and to society at large) than the student who repeatedly offends his classmates with dirty jokes. Under Petitioner's position, students offended by a classmate's dirty jokes could sue their school in federal court for monetary damages under Title IX, while students frightened by gangs would have no recourse under federal law.

B. Out Of Fear Of Being Held Liable For Conduct Beyond Their Control, Schools Will Adopt Draconian Policies Which Limit Basic Rights And Freedoms Of All Students.

Neither the text nor history of Title IX suggest that it was intended to force school administrators to become thought-police, gatekeepers of proper etiquette, or the constant arbiters of sexual/developmental growth-related conflict. Yet, under the interpretation of Title IX advocated by the Petitioner, and forced on schools by the Department of

Education for the past two years, this is exactly what has happened.

Apparently not satisfied with its own properly promulgated regulations, the OCR issued in August 1996 a "policy guidance" which unlawfully and illogically attempted to enlarge Title IX's scope to include liability for student-on-student harassment.[5] See Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 FED.REG. 12,034 at 12,039 (1997) (hereinafter, "OCR Guidance"), pertinent parts of which were first published at 61 FED.REG. 42728 (Aug. 14, 1996).[6]

Within weeks of the issuance of the OCR Guidance, school administrators in North Carolina removed then six-year old Johnathan Prevette from his first grade class for a day, prevented the boy from attending a school ice-cream party, and sent him home with a "Discipline Referral" for kissing a classmate on the cheek. See e.g., Meg Greenfield, *Sexual Harasser?* THE WASHINGTON POST, Sept. 30, 1996 at A23; Jeff Jacoby, *A Letter To Jonathan*, THE BOSTON GLOBE, Oct. 3, 1996 at A17. The boy was warned that if he was caught again kissing, hugging, or hand-holding, he would be suspended. Id. at A17; *Sexual Harassment Kissing Away Reason*, ARIZONA REPUBLIC, Sept. 27, 1996, at B6.

Unfortunately, young Johnathan Prevette was not the only child to fall victim to his school's fear of penalty by the OCR. In New York, a seven-year old, second-grader was suspended for five days for kissing a girl and tearing a button

[5] For the reasons discussed in Section V, *infra*, the OCR's policy guidance on "peer harassment" is legally unsupportable and entitled to no deference by this Court.

[6] The OCR Guidance states that a school should be found in violation of Title IX for sexual harassment if: "(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action." 62 FED.REG. at 12,039.

off her skirt.[7] See *Seven Year Old Suspended 5 Days For Kissing Classmate*, BUFFALO NEWS, Oct. 2, 1996 at A16. And in 1997, school officials in Pittsburgh, Pennsylvania suspended a ten-year old, fourth-grader for two days because he grabbed a girl from behind and subjected another girl to an unwanted hug. *Kid Stuff A Silly Sexual Harassment Charge Against a 10-year Old*, PITTSBURGH POST-GAZETTE, Sept. 25, 1997 at A22.

Due to the rising fear of agency sanction and private lawsuits, reactions such as these to normal childhood behaviors have become quite common.[8] Under threat of penalty by the OCR, many schools have adopted draconian policies which limit the freedoms of all students and circumscribe the ability of teachers and other professional administrators to confront student misconduct on a case-by-case basis. Such policies often provide automatic penalties for such innocent behavior as "hand-holding" and "repeatedly asking out a person who has stated that . . .she is not interested." See Jacoby, *Letter*, THE BOSTON GLOBE at A17. To cite just a few examples, in Mishawaka, Indiana, the Elm Road School has issued a policy forbidding fourth-graders from holding hands, passing romantic notes, or chasing members of the opposite sex at recess. See *Editorial*, PITTSBURGH POST-GAZETTE, March 22, 1998 at C2. And in Fullerton, California, the Nicolas Junior High School has banned all public displays of affection, including hugging and

[7] When asked why he removed the button from his classmate's skirt, the seven-year-old boy replied that it reminded him of "Corduroy", the teddy bear in his favorite book, who is missing a button from his overalls. See *Seven Year Old Suspended 5 Days For Kissing Classmate*, BUFFALO NEWS, Oct. 2, 1996 at A16.

[8] See Tamar Lewin, *Kissing Cases Highlight Schools Fears of Liability for Sexual Harassment*, N.Y. TIMES, Oct. 6, 1996, at A22, A22 ("While the recent suspensions of two little boys for kissing girls were widely seen as excessive, they highlighted the confusion that is sweeping schools as educators grapple with a growing fear that they may be sued for failing to intervene when one student sexually harasses another.")

kissing. See Associated Press, *School Cracks Down on Hugs and Kisses*, THE DALLAS MORNING NEWS, Feb. 15, 1998 at 6A.

Unnatural measures such as these are the natural result of the application of workplace norms to children and adolescents. Unfortunately, the lessons taught by such responses are that even childish expressions of affection and adolescent courtship rituals constitute sexually predatory behavior. Rather than teaching students to respect each other's boundaries and to resolve conflicts maturely, many of the sexual harassment policies already adopted by schools enforce neo-Victorian mores and cultivate a gender-based culture of victimhood. See Sasha Ransom, Comment, *How Far Is Too Far? Balancing Sexual Harassment Policies and Reasonableness In the Primary and Secondary Classrooms*, 27 SW. U. L. REV. 265, 267 (1997) (*hereinafter*, "Ransom, *How Far Is Too Far?*") (arguing that the grafting of workplace norms onto the schoolyard creates gender-based conflict in the schools and undermines educational goals).

This Court's creation of a federal cause of action for "peer harassment" in schools will only magnify the fears of school administrators and encourage the adoption of misguided measures like the ones catalogued above. To the contrary, the refusal to invent a private right of action against school districts for "peer harassment" will allow schools the flexibility to deal with disciplinary problems on a case-by-case basis, without the looming threat of government imposed sanctions and complex federal litigation.

C. Allowing Students To Hold Schools Financially Liable For Misconduct By Other Student Will Drain Scarce Resources From *All* Students.

Petitioner asks this Court to hold that a student may sue his or her school district for monetary damages whenever school officials do not respond appropriately to a complaint

of student misconduct. It is unclear what Petitioner means by "appropriate." In the case at bar, the Complaint states that the school principal "threatened" the alleged harasser and separated the complaining student and the boy who was bothering her within their fifth-grade classroom. Nevertheless, the Petitioner suggests that the school's response constituted deliberate indifference, and, thus, violated Title IX's prohibition on sex discrimination. Petitioner does not say what action she believes would have effectively stopped the harassment. Indeed, much of the conduct complained of in Petitioner's case occurred in the hallways or other settings where no measure short of expulsion could have prevented its occurrence. In effect, then, under the Petitioner's theory, the only practical way for schools to ensure that they will not lose federal funding or be held financially liable under Title IX will be to suspend or expel students accused of harassment. Such a response would, of course, open the school district up to a potential lawsuit by the accused for denial of public education entitlements. See *infra* Section III.b and n. 12; Doe v. University of Illinois, 138 F.3d 653, 679 (7th Cir. 1998) (Posner, C.J., *dissenting from denial of reh'g en banc*) ("[l]iability for failing to prevent or rectify sexual harassment of one student by another places a school on a razor's edge, since the remedial measures that it takes against the alleged harasser are as likely to expose the school to a suit by him as a failure to take those measures would be to expose the school to a suit by the victim of the alleged harassment.")

In order to avoid lawsuits from complaining students, while protecting the due process rights of the accused, school districts would be forced to develop costly new bureaucracies to investigate and respond to complaints of "peer harassment."[9] Moreover, money ordinarily spent on books,

[9] The Department of Education's Office for Civil Rights urges schools to conduct full-blown hearings in which the accuser and the accused have

sports equipment, and musical instruments, would be spent on lawyers fees[10] and possibly large damage awards.[11] "Although the cost of peer-on-peer harassment under Title IX will be borne by the school systems (vis-a-vis 'deep pocketed' taxpayers), it is the students who will ultimately suffer through reduced funding in their education pursuits." Doe, 138 F.3d at 675 (Coffey, J., *concurring*). In addition to these tangible costs, the creation of a federal cause of action for student misconduct would mean that students (often the only witnesses to schoolyard harassment) would have to take valuable time away from their studies to answer questions from lawyers, prepare for depositions, and attend trials. Davis v. Monroe Cty. Sch. Bd., 120 F.3d 1390, 1404 (11th Cir., 1997) (*en banc* opinion).

Unlike private employers in the Title VII context, public schools cannot pass along these "costs" to paying consumers. Thus, although Congress certainly is free, after a careful weighing of such costs, to decide that the benefits of creating a cause of action for "peer harassment" outweigh these high costs, in the absence of a clear expression of Congressional

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the "opportunity to present witnesses and other evidence." OCR Guidance, 62 Fed.Reg. at 12044.

[10] Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., which prohibits sex discrimination in employment, Title IX does not provide for agency investigation and conciliation of complaints prior to the filing of a case in federal court, and thus fails to provide a means by which frivolous suits may be weeded out (or meritorious ones settled) at minimal cost.

[11] Title IX, unlike Title VII, contains no statutory cap on damage awards. Compare 42 U.S.C. § 1981a (limiting the amount of damages a plaintiff can recover under Title VII). In smaller school systems, even one large jury verdict against the district could bankrupt the entire system. See Transcript of Oral Argument before the United States Supreme Court in Gebser v. Lago Vista Ind. Sch. Dist., 1998 WL 146703, *34-35 (March 25, 1998) (argument of Wallace B. Jefferson for Respondent Lago Vista Independent School District) (noting that in 1992-93 the entire budget for the Lago Vista school district was only $1.6 million)

intent this Court should not carve out a new basis for liability under Title IX that will inure to the detriment of all students.

D. Schools Already Have Ethical And Legal Obligations To Protect The Students In Their Care.

A refusal by this Court to create a cause of action under Title IX for damages stemming from student misconduct will not discourage schools from confronting inappropriate student behavior. To the contrary, schools have ethical and legal obligations to protect students within their charge from harassment and intimidation by their peers. Indeed, the premise underlying Petitioner's argument – that, absent the threat of a federal discrimination lawsuit, teachers and other school administrators will not seek to rectify student misconduct – is deeply flawed. In truth, no teacher wants the educational environment disrupted by harassment, violence, or unruly behavior. Schools and teachers are judged by their very ability to teach and, therefore, already have good reason to attempt to minimize behavior that interferes with the learning process.[12]

In addition to these obvious incentives to confront inappropriate student behavior, schools have a legal obligation to protect the students in their charge from harm. For example, in the case at bar, the Monroe Country Board of Education is already required by state law to "adopt a student code of conduct" and "provide for disciplinary action against students who violate [that] code." GA.CODE. ANN. §

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[12] Indeed, for hundreds of years, teachers and principals have disciplined schoolyard bullies in the absence of any federal cause of action regulating the handling of such troublemakers. There is no evidence whatsoever that teachers and principals are unwilling to discipline similarly "peer harassment". Nor is there any evidence that "peer harassment" is not equally amenable to administrative control without need for a legal sword of Damocles, born from Title IX, hanging over the heads of our public schools.

20-2-751.3(a),(b) (Supp. 1998). Georgia law also requires that schools develop a "safety plan" to help curb school violence and promote a safe learning environment. Id. § 20-2-1185(a) (1996).

Moreover, schools that are negligent in the supervision of their students may be held liable in tort for injuries suffered by students as a result of that negligence. Thus, numerous cases show that, where a teacher or other school official negligently fails to supervise students in a particularly dangerous circumstance, or directs or permits a student to embark on a course of conduct which might reasonably be foreseen to result in injuries to another student, the school district may be financially liable. See e.g., Jackson v. Hankinson, 238 A.2d 685 (N.J., 1968) (school board can be held liable for personal injuries suffered by student where person in authority failed to exercise "reasonable supervisory care"); Bauer v. Board of Educ., 140 N.Y.S.2d 167 (1955) (where school district created condition of danger, school district could be held liable for injuries to student resulting from condition); Charonnat v. San Francisco Unified Sch. Dist, 133 P.2d 643 (Cal., 1st Dist., 1943) (similar). The legal obligations already imposed on schools under state laws demonstrate that the remedy sought by the Petitioner is unnecessary and will serve only to drain schools of already scarce resources and impose a gender-based culture of victimhood on our nation's youth.

E. Students Harassed By Classmates Already Posses A Variety of Legal Remedies And Do Not Need Federally Imposed Gender-Politics to Protect Them.

Students who are harassed or intimidated by other students have at their disposal an array of remedies that fall short of instituting a federal action for sex discrimination. For example, a victim of harassment may bring a state law civil action in tort. See Ransom, *How Far Is Too Far?*, 27 SW.

U. L. REV. at 273-74 (suggesting tort as an appropriate remedy for student harassment). Thus, a student who is fondled, pinched, or grabbed without her consent may sue her harasser for battery. See id.; RESTATEMENT 2D OF TORTS § 13 (1965). A student who is verbally threatened or intimidated by a classmate (or group of classmates) may sue her persecutors for assault. See Ransom, *How Far Is Too Far?*, 27 SW. U. L. REV. at 273-74; W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS 43 (5th ed., 1984) (defining assault as one person causing another person "apprehension of a harmful or offensive contact"). In some states, victims may even sue the parents of the student harassers in tort.[13] Moreover, and as explained *supra*, in limited situations, a student who suffers personal injuries at the hands of another student may hold the school district liable under state law.

A student who is harassed by a fellow student may also petition a court for a restraining order – a violation of which would lead to criminal charges against the harasser.[14]

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[13] See e.g., Schernekau v. McNabb, 470 S.E.2d 296 (Ga. Ct. App., 1996); Distinctive Printing & Pkg. v. Cox, 443 N.W.2d 566 (Neb., 1989); Mancino v. Webb, 274 A.2d 711 (Del. Super. Ct., 1971); Linder v. Bidner, 270 N.Y.S. 2d 427 (1966); Caldwell v. Zaher, 183 N.E.2d 706 (Mass., 1962).

[14] See e.g., N.D.CENT.CODE §12.1-31.2-01 (Supp. 1993) (North Dakota) (providing that a person who is a victim of "unwanted acts, words or gestures that are intended to adversely affect the safety, security or privacy" of the victim may seek a court order restraining the individual from having contact with the alleged victim; violation of the court order is punishable by imprisonment of up to one year and/or a fine of up to $1,000.00); MINN. STAT. § 609.748 (1997) (Minnesota) ("[a] person who is a victim of harassment may seek a restraining order from the district court . . . . The parent or guardian of a minor who is a victim of harassment may seek a restraining order from the district court on behalf of the minor."); CAL. CIV. PROC. CODE § 527.6 (West 1997) (California) (victims of harassment may seek a TRO and injunction against the harasser; the court may issue a permanent injunction if the court finds by "clear and convincing evidence that unlawful harassment exists"; any willful violation of an injunction is punishable as a contempt of court);

Ultimately, a student who is physically attacked by a peer may press criminal charges against his or her assailant.

These remedies are available to all victims of student misconduct – whether or not the misconduct at issue is sex-based. The remedies provided under state law offer a mechanism whereby the competing interests of accused and accusing students may properly and fairly be adjusted without resort to federal litigation against the school.

To acknowledge that "peer sexual harassment" is not actionable under Title IX of the Education Amendments of 1972 is not to condone such conduct. To the contrary, a refusal to create such a federal cause of action is to recognize that all forms of violence and harassment by students against their peers are objectionable and that primary responsibility for addressing such misconduct rests not with federal agencies but with parents and schools and the laws of the various states.

III. ALTHOUGH SCHOOLS MAY BE HELD LIABLE FOR KNOWN TEACHER HARASSMENT, A DIFFERENT STANDARD OF LIABILITY MUST APPLY TO STUDENT MISCONDUCT.

A. This Court's Holding In *Gebser* Confirms The View That Schools Are Not Liable Under Title IX For The Harassment of One Student By Another.

In Gebser v. Lago Vista Independent School District, this Court held that, although schools are not vicariously liable for the acts of teachers, a school district may be held liable for the sexual harassment of a student by a teacher, where a high level school official is on notice of allegations of teacher harassment and responds to those allegations with deliberate

WIS.STAT.ANN. § 813.125 (1997) (Wisconsin) (victims of harassment may seek restraining order and injunction against the harasser).

indifference. 118 S. Ct. 1989, 1999 (1998). In other words, an affirmative intent to discriminate may be inferred from a school official's failure to act when notified that one of the school's agents is discriminating on the basis of sex.

Nothing in Gebser points to the conclusion that a school district may lose its federal funding, and be subject to financial liability, for failing to respond to a complaint of harassment by a *non-agent, third-party student*. Indeed, contrary to Petitioner's contention that Gebser eliminated any agency requirement for imposition of liability under Title IX, see *Brief For The Petitioner* at 31-32; see also *Brief of The United States As Amicus Curiae Supporting Petitioner* at 9 & 13, Gebser merely held that schools will not be held *strictly* liable for the acts of its teachers/agents. 118 S.Ct. at 1996-97 & 1999. However, because teachers are employees of the school district, a school official's failure to respond to an allegation that a teacher is sexually harassing students can be viewed as a tacit endorsement of the teacher's behavior, thus giving rise to a basis for liability under Title IX. Although the basis for liability must be a school official's own conduct – or lack thereof – the conduct at issue is a failure to respond to known acts of discrimination *by agents of the school district*. Thus, Gebser does *not* eliminate agency theory from the analysis. To the contrary, the rule of Gebser is that agency status is *necessary*, but *not sufficient*, to create liability for a school district under Title IX.[15]

[15] Petitioner and the United States also misread Gebser's holding that, in order for school districts to be held liable for sexual harassment, "an official who. . .has authority to address the alleged discrimination and to institute corrective measures" must have actual knowledge of the harassment and respond with deliberate indifference. 118 S. Ct. at 1999. Petitioner and the United States read this language to mean that notice to a teacher of student-on-student harassment constitutes sufficient notice to the district (since teachers clearly have the authority to deal with issues of student behavior). See *Brief For The Petitioner* at 31; *Brief Of The United States* at 9. This interpretation contradicts Gebser's express teaching that school districts are not vicariously liable for a teacher's conduct. The

B. Differences Between Teacher Harassment and Student Harassment Mandate Different Legal Approaches.

Petitioner attempts to blur the lines between student misconduct and the sexual harassment of a student by a teacher. Peer harassment, of course, differs from harassment by a teacher in several important respects, and, accordingly, warrants different treatment under the law.

First, as mentioned above, teachers (unlike students) are agents of the school district. School districts are responsible for selecting their teachers and school districts retain significant discretion to discharge public school teachers. As such, school districts can be expected to exercise effective control over teachers, and may properly be held liable for a deliberate refusal to exercise such control. A school district that places a sexual harasser in a position of authority over children and, with deliberate indifference, allows him to continue abusing this power even after school officials are on notice of his misconduct, can reasonably be viewed as possessing *an intent* to create a hostile environment.

By contrast, a school district unfortunate enough to encounter troublemakers in its student body is not responsible for *creating* a hostile environment. A public school cannot select the students it wishes to teach, and cannot simply weed out students with discipline problems and retain only the well-behaved ones. Indeed, students in every state enjoy the right to a free public education guaranteed by law.[16] Thus, a school district faced with a

adoption of this position would lead to the anomalous result that school districts would face strict liability for a teacher's negligence in failing to respond to a complaint of student misconduct, but not for a teacher's own deliberate act of intentional sex discrimination.

[16] See Ala. Const. art. XIV § 256, amended by Ala. Const. amend. 111; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 1; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, §1; Ga. Const. art. VIII, § 1; Haw. Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2nd, § 3; Kan. Const. art. VI, § 1; Ky. Const. §183; La. Const. art. VIII, preamble & § 1; Me. Const. art. VIII, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5, S 91; Mich. Const. art. VIII, §§ 1 & 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, §§ 201 & 205; Mo. Const. art. IX, § 1(a); Mont. Const. art. X, §§ 1, 2; Neb. Const art. VII, §§ 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, §4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, §§ 1, 2; N.D. Const. art. VIII, §§ 1, 2; Ohio Const. art. VI,§ 2; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1, 4; S.C. Const. art. XI, § III; S.D. Const. art. VIII, § 1; Tenn. Const. art. II, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. II, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 2; W.Va. Const. art. XII, § 1; Wis. Const. art. X, §§ 2, 3; Wyo. Const. art. VII, §§ 1, 9.

student harasser is itself a victim of the student's unruly behavior, and its failure to discipline such a student does not necessarily evince an endorsement of the behavior or an *intent* to discriminate. Cf. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28-29 (under the spending clause, monetary damages are only available for intentional violations).

Moreover, school districts simply cannot exercise the same measure of control over the thousands of students in their charge as they can over the acts of a few hundred agent/employees. In addition to their sheer numbers, children (and adolescents in particular) are less likely to follow norms of good behavior than adults. See Doe, 138 F.3d at 675 (Coffey, J. *concurring*) (*citing* Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP.L.REV. 1763, 1767, 1772 (1995)). Thus, reports of student misconduct are more numerous than those of teacher misconduct and cover a wide range of conduct, much of which may be trivial or irrelevant to sex discrimination. In other words, a school administrator may not (at first blush) recognize such a report as anything

more than a garden-variety complaint that "Johnny is bothering me." [17]

Because schools have an obligation to educate *all* students, and because students are inherently more difficult to control than adult employees, the failure of a school district to respond to a particular charge of student misconduct cannot possibly be translated into an act of intentional discrimination. Cf. Doe, 138 F.3d at 678 (Coffey, J., *concurring*) (noting that requiring schools to eliminate harassment by students upon other students "would be an impossible task, for schools are full of all sorts of kids. . .[a]nd unlike harassers in the work place, students can't be fired.")

Second, because of the position of trust occupied by teachers, sexual conduct by a teacher toward a student poses a much greater risk of harm, both to the student and to society, than does inappropriate behavior by a child. Whereas sexual conduct by teachers directed towards elementary or secondary students is never appropriate, much of the sexual conduct that occurs between pre-adolescent and adolescent students can easily be viewed as part of the normal give and take between girls and boys of this age group. At the primary school level, the alleged harassers are children, who often have no notion of sex, let alone "sexual harassment". See Fred Bruning, *An American View: Going Overboard On Sexual Harassment*, MACLEAN'S, Oct. 21, 1996 at 15. Thus, at the primary or secondary school level, a kiss on the cheek, a

[17] It is, of course, true that, in order to avoid the possibility of Title IX litigation, a school district might err on the side of caution (as many employers do in the face of sexual harassment allegations) and simply expel accused harassers even where the facts are in dispute, or the conduct ambiguous in nature. Putting aside the risk that the expelled student might bring his own claim against the school district, see *supra*, the prospect of primary and secondary school students being set adrift in the world – and barred from further public education – is profoundly troubling. Yet, in many cases this would be the only effective means of ensuring the cessation of the allegedly harassing conduct.

sexually suggestive compliment, and the persistent pursuit of a romantic relationship are normal parts of growing up.

Indeed, at the primary and secondary school level, it is even questionable whether sexual misconduct by students is properly labeled "sexual harassment" at all. As Professor Catherine MacKinnon has noted, the problem of sexual harassment arises "in the context of unequal power." CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979). In an educational setting, the power relationship is the one between the student and the teacher. See Rowinsky v. Bryan Ind. Sch. Dist., 80 F.3d 1006, 1011 n.11 (5th Cir.), cert. denied, 117 S.Ct. 165 (1996) (citation omitted). In the context of two students there is, in fact, no established power differential. A schoolyard threat or an unwanted sexual advance by a peer simply does "not carry the same coercive effect or abuse of power as [similar conduct committed] by a teacher. . . .This is not to say that the behavior does not harm the victim, but only that the analogy is missing a key ingredient – a power relationship between the harasser and the victim." See id. These basic differences between teachers and students plainly warrant different treatment under the law for teacher harassment and misconduct by a student, and underscore the appropriate limit of this Court's Gebser decision.

C. Title IX's Properly Promulgated Regulations Contemplate School District Responsibility For Teacher Harassment But Not Student Harassment.

Title IX's properly promulgated implementing regulations support the position that school districts bear responsibility under Title IX for the known acts of their teachers but not for the acts of their pupils. See 34 C.F.R § 106.31(b)(6). Section 106.31(b)(6) of the regulations prohibits schools from "providing significant assistance to any . . . person wh[o] discriminates on the basis of sex in providing aid, benefit[s],

or service[s] to students or employees." Teachers clearly provide educational services to students. Thus, even absent vicarious liability, a school district that "provid[es] significant assistance to" a teacher who is sexually harassing his female students (say, by deliberately turning a blind eye and enabling him to continue undisciplined), itself violates the Act. On the other hand, students do not customarily provide "aid, benefit[s] or service[s]" to their peers and, accordingly, a school district cannot be held liable under Title IX for failing to curb harassment of one student by another.

IV. THE IMPOSITION OF LIABILITY ON A SCHOOL DISTRICT FOR ITS RESPONSE (OR LACK OF RESPONSE) TO STUDENT MISCONDUCT IS INCONSISTENT WITH THIS COURT'S HOSTILE ENVIRONMENT JURISPRUDENCE.

Title IX does not prohibit sexual harassment *per se*. Rather, Title IX (like Title VII) simply prohibits discrimination "on the basis of sex". See 20 U.S.C. § 1681(a); 42 U.S.C. § 2000e et seq. The failure of a school to deal effectively with a particular complaint of student misconduct is *not* discrimination "on the basis of sex" and is simply not a cognizable basis for Title IX liability by a school.

This Court has long held that not every instance of harassment constitutes unlawful sex discrimination. See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998) ("We have never held that . . .harassment. . .is automatically discrimination because of sex merely because the words used have sexual content or connotations."). Indeed, the critical issue in determining whether alleged harassment rises to the level of unlawful discrimination is "whether members of one sex are exposed to disadvantageous [conditions] to which members of the other sex are not

exposed." Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., *concurring*); cf. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 & 66 (1986) (although harassment *because of sex* may constitute unlawful sex discrimination, not all workplace harassment is discriminatory). Thus, abuse or misconduct directed at members of both sexes is not discrimination *on the basis of sex* and is not actionable under federal law. See e.g. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (in order to prove a claim for hostile environment sexual harassment, the plaintiff must show that *but for* the fact of her sex, she would not have been the object of harassment) (*cited in* Meritor, 477 U.S. at 66-67); cf. Harris, 510 U.S. at 25.

Under these well-established principles, a twelfth-grade boy who continuously harasses the girls and the boys in the freshman class has not created a hostile environment "on the basis of sex," and his school should not face liability or a loss of federal funding under Title IX for his conduct. Likewise, a school district that treats equally complaints of student harassment by both girls and boys, has not discriminated "on the basis of sex" and should not face the prospect of monetary damages or a loss of federal funding under Title IX.

By contrast, a school district that consistently treats complaints of student harassment by girls differently than similar complaints by boys *has* violated Title IX. In such a case, the school is liable, not for its failure to respond to any one complaint, but rather, for its selective and discriminatory enforcement of the school's disciplinary rules. See 34 C.F.R. §106.31(b)(2-3) (1997) (prohibiting schools that accept federal funding under Title IX from treating students differently on the basis of sex); Rowinsky, 80 F.3d at 1010 & 1016. Indeed, this type of disparate treatment of similarly-situated male and female students by educational institutions is precisely the type of discriminatory practice that Title IX seeks to remedy.

Under Petitioner's theory of liability, however, school

districts would face the prospect of a loss of federal funding and potentially exponential monetary damages even where school officials did not themselves discriminate or endorse the complained of harassment. Moreover, there is no indication that, under Petitioner's theory of liability, the complained of harassment even needs to be "on the basis of sex." Thus, according to Petitioner's view, the boorish senior who harasses both the girls and boys in the freshman class has committed "sexual harassment" for which the school district may be held liable if it fails to act once on notice.

In other words, under the interpretation of the statute urged by the Petitioner, school districts should be held liable under Title IX whenever they fail to react to *any* type of harassment or sexual misconduct by students – irrespective of whether or not the conduct created a disadvantageous environment for one sex and irrespective of whether complaints by both sexes are treated equally by the district. In effect, the Petitioner urges this Court to create a federal private right of action for conduct that is not even discriminatory, as this Court's cases define that term. Such a result would ignore the theoretical underpinnings of federal sexual harassment law and, in effect, transform Title IX into a Federal Student Civility Code.[18] Such an expansive and far reaching change in federal discrimination law is for the Congress, not the judicial branch, to adopt.

V. THE DEPARTMENT OF EDUCATION'S POLICY GUIDANCE ON "PEER HARASSMENT" IS *NOT* ENTITLED TO DEFERENCE BY THIS COURT.

Apparently recognizing the weakness of their case as a matter of law and logic, Petitioner urges this Court to defer blindly to the OCR's latest interpretation of Title IX. See *Brief For The Petitioner* at 34. Petitioner's reliance on the

[18] Indeed, such a result would create an even broader basis for liability than in the employment context.

OCR's current interpretations – which were, in fact, rejected by this Court only six months ago in Gebser – is clearly misplaced.

The deference accorded an interpretive ruling depends on such factors as the circumstances of its promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into its formulation, and the nature of the agency's expertise. Board of Educ. v. Harris, 622 F.2d 599, 613 (2d Cir. 1979) (*citing* Batterton v. Francis, 432 U.S. 416, 425 n. 9 (1977)).

Contrary to Petitioner's suggestion, the OCR's interpretation of the statute as encompassing "peer harassment" is *not* long-standing. In fact, prior to the issuance of the OCR Guidance, existing OCR policy memoranda defined sexual harassment as "verbal or physical conduct of a sexual nature imposed on the basis of sex, by an *employee or agent* of the recipient," and did not address the question of liability for student misconduct. See OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981). In fact, the OCR's current interpretation was first published on August 14, 1996 – after the Fifth Circuit rejected a claim of "peer harassment" against a school district by a student in Rowinsky v. Bryan Ind. Sch. Dist., and just in time to be cited in the cert petition filed in this Court in the same case. See Office for Civil Rights, *Sexual Harassment Guidance: Peer Sexual Harassment (DRAFT)*, 61 FED.REG. 42728 (Aug. 14, 1996); Brief of the United States in No. 96-4, p. 2 & 11 (August, 1996). The OCR refused public comment on its dramatic departure from existing interpretations of Title IX. See 61 FED.REG. 42728 (accepting comment only on "whether the Guidance is clear and complete"); 62 FED.REG. at 12035 (the OCR "did not request substantive comments" regarding its interpretation of the Act as prohibiting student-on-student harassment). The

timing of the Guidance's initial release, combined with the agency's refusal to take substantive public comment, manifestly demonstrates that it was adopted, not as a clarification of existing law, but rather, as a litigation strategy to push the courts into adopting a novel expansion of the law.

The fact that the OCR's current position was adopted only two years ago as part of a deliberate litigation strategy (and is, indeed, inconsistent with its prior pronouncements) clearly demonstrates that the OCR Guidance is entitled to no deference by this Court. See North Haven Bd of Educ. v. Bell, 456 U.S. 512, 538 n. 29 & 522 n.11 (1982) (no deference given to Department of Education interpretation of Title IX that was inconsistent with prior interpretations); INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n. 30 (1987) (rejecting an agency's request for deference to its position due to the inconsistency of the agency's position over the years); see also Kelley v. EPA, 15 F.3d 1100, 1108 (D.C. Cir. 1994) (agency interpretations developed for purposes of litigation deserve no deference).

Supporting this conclusion is this Court's rejection of the OCR Guidance only six months ago. In Gebser, this Court held that adoption of the OCR's proposed standard of liability in the context of teacher-on-student harassment would "frustrate the purposes" of the statute. See Gebser, 118 S.Ct. at 1995 & 1997. Thus, *a fortiori* (for the reasons discussed above), Petitioner's view that this Court should defer to the OCR's Guidance with respect to "peer harassment" is wrong as a matter of law.[19] Accordingly, the

[19] Likewise, this Court should not afford deference to the OCR's enforcement actions and "findings" made in specific administrative cases because: (1) the OCR only recently began treating complaints of peer harassment as within its jurisdiction; (2) Letters of Finding are written to compel voluntary compliance with the OCR's novel interpretation of Title IX; and (3) the Letters of Finding do not reflect the "deliberate consideration of a rulemaking proceeding." See Rowinsky, 80 F.3d at 1015.

OCR's views are entitled to *no* weight.

CONCLUSION

Clearly, schools should not tolerate students mistreating each other. Although the failure of a school district to respond to a particular complaint of student misconduct may reflect a grave error of judgment or sensibility, it simply is not sex discrimination within the intended scope of Title IX.

Respectfully submitted,

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